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NO. 88-1578

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1988

GABRIEL THORNOCK, by his next friend
and mother LANA (THORNOCK) BAUGH and
LANA (THORNOCK) BAUGH,
Respondents,

vs.

BOISE INDEPENDENT SCHOOL DISTRICT #1,
Petitioner.

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Appendices ii

Table of Authorities iii

Opinions Below iv

Statement of the Case 1

Argument 6

Conclusion 15

Appendix 18

APPENDICES

1.	Certified Transcript of Oral Argument Before the Idaho Supreme Court #16455, March 8, 1988 (partial)	A-1
2.	Transcript of Due Process Hearing - January 23, 24, 25, 1984 (partial)	A-2
3.	Interim Opinion of the District Court of Ada County, In and For the State of Idaho, #85493 February 12, 1985	A-3
4.	Responsive Pleading of Petitioner Before The District Court of Ada County, In and For the State of Idaho - April 16, 1984	A-4
5.	20 U.S.C.S. §1415, 34 C.F.R. §§300.403, 300.500-300.514	A-5

TABLE OF AUTHORITIES

1. CASES PAGES

Board of Education of the Hendrick Hudson School District v. Rowley,
458 U.S. 176, 102 S.Ct. 3034,
73 L.Ed.2d 690 (1982)

Burlington School Committee of the Town of Burlington, Massachusetts, et al., v. Department of Education of the Commonwealth of Massachusetts, et al.,
471 U.S. 359, 105 S.Ct. 1996
85 L.Ed.2d 385 (1985)

2. STATUTES

20 U.S.C.S. §1415 A-5

3. REGULATIONS

34 C.F.R. §300.403, 300.500-300.514 A-5

3. POLICY INTERPRETATIONS OF U.S. DEPARTMENT OF EDUCATION - OFFICE OF SPECIAL EDUCATION PROGRAMS:

Rojahn - EHLR 211:291

OPINIONS BELOW

The following is included as an addition to the Lower Court opinions presented in the Petition, and is attached as Appendix A-3:

Interim Opinion of the District Court of Ada County, in and for the State of Idaho, #85493, February 6, 1985

STATEMENT OF THE CASE

In its memorandum decision in favor of Respondents, the state District Court observed:

> "The evidence in this case, unlike most cases, is clear and uncontroverted as to every relevant fact. By any standard of evidentiary review this Court's ruling would have to be the same as is herein announced." (Pet. A-2, p.10)

To respond to the clarity of the evidence favorable to Respondents' case, the Petitioner has taken the position on appeal that the legal analysis of the Idaho District and Supreme Courts was so flawed that the clear evidence upon which those decisions were based is irrelevant to a proper legal analysis. Thus, Petitioner offers an extensive recitation of alternative facts in its Statement of the Case and Argument.

In this process, Petitioner makes a number of factual misrepresentations to this Court. And because Petitioner's "facts" are not those relied upon by the lower courts, the refutation of these factual misrepresentations requires substantial reference to the record. Therefore portions of the record are reproduced and attached to this brief in the Appendix.

On pages 6-9, 11, 14, and 52, Petitioner asserts that

Respondent Gabriel Thornock's parents impeded the ability of Petitioner to evaluate Gabriel and design a program by refusing to turn over previous school records and test results and refusing consent to evaluation. In fact, Petitioner's Counsel admitted in oral argument before the Idaho Supreme Court that Petitioner's own personnel had done an evaluation of Respondent Gabriel Thornock and that the results were available during the course of the proceedings below (A-1).

On page 13, Petitioner asserts that, "at no time thereafter did Gabriel's parent ever indicate any interest or request that a program involving placement in a public school setting be developed." This is not so. The hearing officer's decision (Pet.A-5, pp.9,10) states:

> "Mr. Baugh stated that if the family could no longer afford private placement with an individual aide, he and Mrs. Baugh would need to consider a public setting. Mr. Baugh further testified on rebuttal that he informed the Boise District officials in the August, 1983 meeting that at some future point in time the family could run out of money, and would at that point have to consider public school placement."

On pages 14 and 26, Petitioner states, "As was conceded by all, Gabriel was placed in a regular third grade classroom by his parent, solely for socialization purposes

. . . " and that he had ". . . no chance of advancing academically in the regular classroom." This is not so. The Idaho Supreme Court decision (Pet. A-2, p.3) states: " . . .Gabriel's parents decided to place him in a private school to better attain social integration **and achievement goals**." (emphasis added). The Idaho District Court (Pet. A-4, p.4) finds that Gabriel made remarkable progress in the mainstreamed private setting. Uncontradicted testimony supports the Courts' findings (A-2, pp.1-10).

On the same page, Petitioner claims that the aide provided Gabriel with his instruction while the classroom teacher taught the rest of the class. No evidence supports this statement. The teacher presented uncontradicted of her teaching methods with Gabriel (A-2, p. 8).

On page 16, Petitioner asserts that " . . . comparable benefits (aide services to achieve mainstreaming) were not provided to public school children with federal EAHCA funds." Petitioner's own witnesses at the administrative hearing testified that such funds are used by the Petitioner district to provide aide services to handicapped children in regular education classrooms (A-2, pp. 10, 11).

On page 16, Petitioner asserts that the Respondents had been offered a number of placement options at the

November 15, 1983 meeting. The District Court decision (Pet. A-4, p.4) finds that only one, segregated placement was offered.

On page 19, Petitioner implies that the Respondents did not dispute that Gabriel would have a free, appropriate public education were he enrolled in public school, citing the hearing officer's decision. This is not so. Respondents conceded that the Petitioner had the **resources** to provide a FAPE, but never conceded the willingness to so provide or that a FAPE would actually be provided. That conclusion was the hearing officer's (Pet. A-5, p.13).

While Petitioner does not seek review of the standard of review used by the State District Court, the standard used by the lower court is misrepresented. Judge Durtschi did not rule he would " . . . give no weight whatsoever to the administrative proceedings . . ." (Pet. p.22). The opinion states:

> "Since the statute requires the Court to base its decision 'on the preponderance of the evidence' it is apparent that the findings and conclusions of the hearing officer and review officer carry no weight whatsoever and have no legal effect" (A-3, p. 7).

On page 52, Petitioner asserts that an independent educational evaluation obtained by the parents at their

own expense was conducted by a person not certified under applicable regulations to conduct a comprehensive evaluation for school district purposes. This is not so, and is not supported anywhere in the evidence or record in the case. Petitioner's own experts refer to Dr. Day as "very well qualified" and have no dispute with his evaluation. (A-2, pp. 6,7).

ARGUMENT

A. "Petitioner's Duty Was to Make Comparable Part B Funded Services Available, Not FAPE."

Petitioner's first issue does not justify granting a Writ of Certiorari because it represents a fundamental misinterpretation of the holding of the Idaho Supreme Court. The state court did characterize the main issue in the case as "... whether the District Court erred in ruling that the school failed to offer Gabriel a FAPE" (Pet. A-2, p.11). But Petitioner asserts that the holding of the state court is that every private school handicapped child must be offered a "full blown" FAPE with completely developed IEP, leading to extreme financial and personnel burdens upon school districts. But the Court only ruled as to Gabriel Thornock, not all private school handicapped children. The EAHCA, 20 U.S.C. §1415 and implementing regulations clearly give parents of private school children the right to invoke the due process mechanisms available to challenge a school district's position that a FAPE is available (A-5).

A policy statement by the U.S. Department of Education, Office of Special Education Programs, reported at EHLR 211:291, states:

> "It is clear that all of these students would be

> entitled to due process in disputes as to their identification and evaluation . . . once a determination has been made that a particular private school child will participate in the program, then due process procedures could be used to resolve disputes concerning the special education and related services that the agency proposes (or refuses) to provide. **In addition, in those cases where there is a disagreement between a parent and a public agency regarding the availability of a program appropriate for the child, due process procedures are also available. The parent of a private school handicapped child has the right under 34 C.F.R. 300.403(b), to invoke the due process procedures in Sections 300.500 - 300.514 to challenge the LEA (local education agency) regarding the availability of a program appropriate for the child and the question of financial responsibility."**
>
> (emphasis added)

The Idaho Supreme Court clearly discussed the obligation of the Petitioner to demonstrate the availability of a FAPE in the context of the due process challenge by Respondents on that issue.

> "In a letter to the District dated November 21,

> 1983, Gabriel's mother and attorney correctly informed the District that the District's latest offer of placement was not the 'least restrictive' that would be 'appropriate,'and to initiate the due process hearing procedures to which they were entitled. **At this point**, the District was certainly obligated to tender a valid IEP." (Pet. A-2, pp.18-19)

Since the state courts found that the Respondents had failed to meet the challenge of demonstrating that a FAPE was available for Gabriel, the Petitioner was obligated to reimburse the parents for the cost of alternative appropriate services under the holding of Burlington School Committee of the Town of Burlington, Massachusetts, et al. v. Department of Education of the Commonwealth of Massachusetts, et al., 471 U.S. 359, 105 S.Ct.1996, 85 L.Ed. 385 (1985). There is no ruling by the Idaho Supreme Court that the segregated placements of other children are not appropriate. The decisions below are based on Gabriel's abilities and success. As noted by the state District Court: "In fact, the evidence shows that Gabriel affirmatively proved by his performance over the prior two years that mainstreaming would be appropriate." (Pet. A-4, p.32). By the very nature of the individual planning contemplated by the EACHA for each handicapped child, any ruling related to the appropriateness of the education of any given child is of limited precedential

impact.

Even if the Idaho Supreme Court's ruling was as broad as described by Petitioner, no proof of the "burden" predicted by Petitioner exists on the record. Nor can it be inferred, given the small number of private school handicapped children in relation to the numbers of public school children who presumably receive a "full blown" IEP as a matter of course.

Petitioner's position that its obligation to voluntarily placed private school handicapped children is only to provide "comparable services" to those provided to public school children with EAHCA funds is of no consequence. As noted earlier, the Petitioner in fact **uses** federal EAHCA funds to provide aides to facilitate mainstreaming of handicapped children. Petitioner now tries to draw a distinction, maintaining it uses federal funds to mainstream physically handicapped children, but not children like Gabriel. Such a position violates the federal policy statement quoted in Petitioner's argument at page 49, in that it results in the removal of handicapped children from regular classrooms on the basis of handicapping condition, configuration of the service delivery system and availability of related services.

B. "Mainstream reference - Doesn't Require Warehousing Retarded Children in Regular Classrooms"

The issue raised in this section of Petitioner's brief is that the education received by mentally retarded children in the regular education setting under the mandate of this decision will not be "appropriate", either in terms of general education standards or as that term is used in the EAHCA and as interpreted in this Court's ruling in Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

1.

The first portion of this Argument does not justify granting the petition.

a.

The decision deals with just one child. Gabriel had been in the regular education classroom for two years, making outstanding progress. Whether or not other children labeled mentally retarded possess the qualities which allow Gabriel to succeed in such placements was not before the Idaho Supreme Court. This Court similarly limited the scope of its own ruling in Rowley (supra).

b.

The issue of the appropriateness of the education Gabriel was receiving in the mainstreamed placement was not raised by Petitioner until after the evidentiary hearing. Petitioner's counsel stated at the hearing: "I don't think we're contesting the overall appropriateness of Gabriel's

education at St. Joseph's." "I don't want to create the impression that we're attacking the overall education he is receiving" (A-2, pp.11, 12). Thereafter, Petitioner declined the opportunity to present new evidence in District Court (Pet. A-4, p.8). Any issue as to the appropriateness of the education Gabriel was actually receiving was waived.

2.

The portion of Petitioner's argument that deals with the Rowley (supra) case and the standard for "appropriate" special education does not justify granting the Petition because the decision below is consistent with the Rowley opinion.

a.

This Court limited its analysis in Rowley to the case at bar:

> "We do not attempt today to establish one test for determining the adequacy of educational benefits conferred upon all children covered under the Act." 458 U.S. 201

This Court's decision in Rowley does not rule that the least restrictive educational placement to which a handicapped child is entitled be one in which he or she can achieve passing marks and advance from grade to grade. As noted in this Court's opinion, Amy Rowley was **in** a regular classroom. This mainstreaming was facilitated

by extensive related services: An F.M. hearing aid and a wireless transmitter used by the teacher and other students, a teletype machine for communication with her parents, sign language classes for administrators, tutoring and speech therapy (458 U.S. 184). With these related services, Amy advanced with her class and was remarkably well adjusted (458 U.S. 185). The parents demanded more, (an interpreter), so as to allow Amy to excel on a basis commensurate with the opportunities given non-handicapped children. In this context, this Court ruled that the achievement of passing marks and advancing from grade to grade was the standard that demonstrated that the education provided Amy was appropriate and that the district was not obliged to provide more. But this standard of passing marks and grade advancement is the ceiling of a district's obligation to provide special services in a mainstreamed setting, not the floor below which no obligation exists.

> "The Act requires participating states to educate handicapped children with non-handicapped children whenever possible. **When that 'mainstreaming' preference of the Act has been met and a child is being educated in the regular classrooms** of a public school system, the system itself monitors the educational progress of the child."
>
> (458 U.S. 202, 203) (emphasis added)

Since the education offered Gabriel by Petitioner did not meet the mainstreaming preference noted by this Court, the standard set by Rowley does not come into play. In addition to its admonitions that it was setting down no general rules applicable to all handicapped children, this Court makes clear that passing marks and moving from grade to grade is not the standard required of districts for all handicapped children:

> "Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction . . . the child is receiving a 'free appropriate public education' as defined in the Act." 458 U.S. 189

Since, with supportive services Gabriel benefitted from his instruction, in a regular classroom, the education thus provided was "appropriate," as that term is used in the Rowley decision.

The fact that Gabriel also benefitted behaviorally and socially from his interaction and friendships with non-handicapped classmates (A-2, pp.1-5) is not, strictly speaking, relevant to the issues presented by Petitioner. However, it does demonstrate the wisdom and beneficial public policy of the Act's mainstreaming requirements.

c.

The Petitioner suggests that the Idaho Supreme Court's

decision is out of step with the majority of post Rowley decisions. But the citation to Ronker v. Walters, 700 F.2d 1058 (CA Ohio 1983), cited at page 45, simply notes that education with non-handicapped children is only to occur to the "maximum extent appropriate". This is a mere recitation of the language of the statute and regulations. The passage quoted by Petitioner from Quackenbush v. Johnson City School District, 716 F.2d 141 (2nd Cir. 1983) at p.147 is that Court's quotation of this Court's opinion in Rowley! Quackenbush dealt with whether a cause of action under the Civil Rights Act exists concomitant with the judicial review procedures under the EAHCA. The Rowley passage is cited to demonstrate the precision of procedural safeguards established by Congress, and the reference to least restrictive environment standards is obiter dicta. Similarly, the quotation cited at page 47 from Board of Education of East Windsor Regional School v. Diamond, 808 F.2d 987 (3rd Cir. 1986), is misinterpreted. According to the opinion, Andrew Diamond required a residential, segregated placement in order to receive an appropriate education. The Third Circuit Court referred to Rowley in the context of dismissing the school district's argument that the education it offered need only be "of benefit" in order to meet the appropriateness standard. The two educational placements under consideration in Diamond (supra) were both totally segregated. The passing reference to the Rowley standard for services in a regular classroom is obiter dicta.

There is no split of authority among the circuits on this issue.

C. "Parental Failure to Cooperate"

This issue does not justify granting the Writ of Certiorari. It was not contained in Petitioner's pleadings in the state District Court (A-4) and was raised for the first time on appeal.

Petitioner's counsel conceded in oral argument before the Idaho Supreme Court that the Petitioner's own personnel had performed a current evaluation on Gabriel (A-1). The reviewing officer's decision, which Petitioner seeks to uphold, finds that Respondents acted in good faith (Pet. A-6, p.4).

CONCLUSION

The findings of the Idaho courts as to the appropriateness of Gabriel's education in a regular education classroom and other factual matters are well supported by competent evidence in the record. The Idaho Supreme Court's legal conclusion that the Petitioners were obliged to offer Gabriel a free, appropriate public education, and that the education thus offered was inadequate, are well grounded in the plain meaning of the Education for All Handicapped Children's Act, implementing regulations and applicable case law. The award of money to the Respondents in the case was required under this Court's ruling in the Burlington case.

By the very nature of the individual decision making

procedures required under the Act, the onerous burden upon school districts predicted by Petitioner will not materialize.

No citation was made to any court decision which holds opposite to the Idaho Supreme Court's ruling. No split of authority exists which requires resolution.

The Petition for Writ of Certiorari is permeated with factual misrepresentations. Any review undertaken by the United States Supreme Court runs the risk of establishing national precedent based upon an inaccurate assessment of the facts.

The lack of cooperation by the Respondents alleged by Petitioner was not prejudicial to Petitioner's case, and was raised as an issue for the first time on appeal. Even if true, the contention is so particular to this case as to not present an issue of any precedential importance so as to require review by the United States Supreme Court.

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted this 25 day of April, 1989.

J. Brent Marchbanks
Attorney for Respondents

PROOF OF SERVICE

I, J. Brent Marchbanks, a member of the Bar of the United States Supreme Court, representing the Respondent on whose behalf service of the foregoing document has been made, hereby certify that all parties required to be served have been served in compliance with Supreme Court rule 28.3, by depositing a copy of the foregoing document in the United States Post Office, First Class, postage prepaid addressed to counsel of record at this post office address listed as follows:

Stewart A. Morris
PO Box 1001
Boise, Idaho 83701

on this 25 day of April, 1989.

J. Brent Marchbanks
Attorney for Respondents